IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 03-34419

LESLIE EVERETTE BROOKS

Debtor

ANGELA YVETTE BROOKS

Plaintiff

v. Adv. Proc. No. 03-3194

LESLIE EVERETTE BROOKS

Defendant

MEMORANDUM ON MOTION TO DISMISS

APPEARANCES: THOMAS F. DILUSTRO, ESQ.
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Knoxville, Tennessee 37902
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Attorney for Defendant

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

This adversary proceeding is before the court upon the Complaint of Creditor in Objection to Defendant's Discharge (Complaint) filed by the Plaintiff on November 17, 2003, "demand[ing] that the discharge by the United States Bankruptcy Court of the Defendant of this obligation [pursuant to a Marital Settlement Agreement] would be wrongful and should be denied[.]"

On April 30, 2004, the Defendant filed a Motion to Dismiss for failure to state a claim upon which relief can be granted. The Defendant avers that the Plaintiff has not alleged any facts to support either a denial of his discharge or the nondischargeability of any debt owed to the Plaintiff pursuant to the parties' Marital Dissolution Agreement.

I

The Plaintiff filed her Complaint, alleging that the Defendant has failed to honor the parties' Marital Dissolution Agreement filed in the Fourth Circuit Court for Knox County, Tennessee, on October 29, 2002, and incorporated by reference into a Final Decree of Divorce entered on December 4, 2002, both of which were attached to the Complaint. The Plaintiff alleges that at the time they were divorced, the parties were joint debtors in a Chapter 13 bankruptcy case, and pursuant to the Marital Dissolution Agreement, they agreed to be equally responsible to the Chapter 13 Trustee for their plan payments. Subsequently, the Defendant filed his pending Chapter 7 bankruptcy case and listed marital debts owed to the Plaintiff as debts to be discharged. The Plaintiff's Complaint avers that the Defendant "is attempting to skirt the issues contemplated by the Fourth Circuit Court and the parties by

filing the Chapter 7 bankruptcy." Additionally, the Plaintiff's Complaint states that "[t]he Marital Settlement Agreement, in that it *inter alia* 'settles and determines all claims for alimony,' provided the Plaintiff with a periodic alimony benefit necessary for her support which cannot be discharged in bankruptcy." Accordingly, the Plaintiff asks the court to deny the Defendant's discharge of the obligation. The Adversary Proceeding Cover Sheet filed in conjunction with the Complaint lists the cause of action as "Objection to discharge of debtor under Title 11, Chapter 7, United States Code, 11 U.S.C. § 727."

The Defendant seeks to dismiss the Complaint for failure to state a claim upon which relief may be granted pursuant to 11 U.S.C.A. § 727(a) (West 1993), citing no factual allegations that establish a prima facie case for denial of discharge. Additionally, the Defendant argues that while the Plaintiff makes references in her Complaint to the parties' Marital Dissolution Agreement, she has not cited the proper statutory authority for nondischargeability of a debt, nor has she offered any evidence or factual allegations to support a determination of nondischargeability under 11 U.S.C.A. § 523(a) (West 1993 & Supp. 2004).

Pursuant to E.D. Tenn. LBR 7007-1, the Plaintiff filed a response to the Motion to Dismiss on May 20, 2004, arguing that although her Complaint incorrectly identified § 727(a) as the authority under which she was seeking relief, the allegations in her Complaint clearly establish that she seeks a determination that the debts owed pursuant to the Marital Dissolution Agreement are nondischargeable alimony, maintenance, or support.

Nevertheless, the Plaintiff does not identify the section of the Bankruptcy Code under which she was making this averment.

II

Federal Rule of Civil Procedure 12(b)(6) allows a defendant to move for dismissal of a complaint for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6) (applicable in adversary proceedings pursuant to FED. R. BANKR. P. 7012(b)). When faced with a motion to dismiss pursuant to Rule 12(b)(6), courts will "construe the complaint in the light most favorable to the plaintiff, accept all the factual allegations as true, and determine whether the plaintiff can prove a set of facts in support of its claims that would entitle it to relief." *Bovee v. Coopers & Lybrand, C.P.A.*, 272 F.3d 356, 360 (6th Cir. 2001). All factual allegations are accepted as true, but the court is not required to accept legal conclusions or unwarranted factual inferences as true. *Mich. Paytel Joint Venture v. City of Detroit*, 287 F.3d 527, 533 (6th Cir. 2002). Instead, the court should focus on "whether the plaintiff has pleaded a cognizable claim[,]" *Marks v. Newcourt Credit Group, Inc.*, 342 F.3d 444, 452 (6th Cir. 2003), and the complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief." *Buchanan v. Apfel*, 249 F.3d 485, 488 (6th Cir. 2001) (quoting *Conley v. Gibson*, 78 S. Ct. 99, 102 (1957)).

III

The Plaintiff's Complaint and Adversary Proceeding Cover Sheet state that the Plaintiff is objecting to the Debtor's discharge under § 727(a) of the Bankruptcy Code, which provides that unless one of ten exceptions is present, "[t]he court shall grant the debtor a discharge[.]" 11 U.S.C.A. § 727(a). These exceptions are, generally, as follows: (1) the debtor is not an individual; (2) the debtor fraudulently transferred or concealed property; (3) the debtor falsified or destroyed financial documents; (4) the debtor acted or testified fraudulently in connection with the bankruptcy case; (5) the debtor cannot account for a loss of assets; (6) the debtor has disobeyed a court order or failed to testify; (7) the debtor has acted fraudulently with respect to an insider in a bankruptcy case; (8) the debtor has been granted a Chapter 7 discharge within the past six years; (9) the debtor has been granted a Chapter 12 or Chapter 13 discharge within the past six years in which unsecured creditors were not paid in full or at least 70% of their allowed claims; and/or (10) the debtor waives discharge. *See* 11 U.S.C.A. § 727(a)(1) through (10).

Certain debts may be excepted from a debtor's discharge, if the court determines that they are nondischargeable pursuant to § 523(a). *See* 11 U.S.C.A. § 727(b). The nineteen specific types of debts that are nondischargeable under § 523(a) are as follows: (1) customs taxes; (2) property obtained by false representations, false pretenses, or actual fraud, or by using documents representing the debtor's financial condition that are materially false with an intent to deceive; (3) certain unscheduled debts; (4) fiduciary fraud, embezzlement, or larceny; (5) alimony and/or child support; (6) judgments against the debtor for willful and

malicious injuries; (7) fines, penalties, and/or forfeitures; (8) student loans; (9) personal injury or wrongful death judgments against the debtor arising from his driving under the influence of alcohol or drugs; (10) debts scheduled in a prior Chapter 7 case in which the debtor was denied or voluntarily waived discharge; (11) judgments against the debtor arising from fiduciary fraud in connection with any bank or credit union; (12) malicious or reckless failure by the debtor to maintain capital of a bank or credit union; (13) any restitution awarded under title 18 of the United States Code; (14) debts incurred to pay taxes referenced in § 523(a)(1); (15) property settlements in a divorce proceeding; (16) condominium fees or assessments past due; (17) filing fees required under title 28 of the United States Code; (18) social security benefits in the nature of support; and (19) fines or judgments assessed for violation of the Securities Exchange Act or fraudulent sale or purchase of securities. *See* 11 U.S.C.A. § 523(a)(1) through (19).

Section 523(a) provides the exclusive method for requesting a determination of nondischargeability of a particular debt, and the only types of debts that can be nondischargeable are set forth in § 523(a)(1) through (19). *See Dollar Corp. v. Zebedee (In re Dollar Corp.)*, 25 F.3d 1320, 1325 (6th Cir. 1994) (dischargeability determinations are governed by § 523); *Baker v. United States*, 100 B.R. 80, 83 (M.D. Fla. 1989) ("The exclusive list of exceptions to discharge is found in § 523, and case law states that the exceptions are to be strictly construed."); *In re Miklas*, 265 B.R. 312, 316 (Bankr. M.D. Fla. 2001) ("The dischargeability of debts is determined exclusively by [§] 523(a)."); *Rowan v. Morgan (In re Rowan)*, 15 B.R. 834, 840 (Bankr. N.D. Ohio 1981) ("[In the legislative history of the

Bankruptcy Code,] Congress evidenced its intent that all nondischargeable debts be set forth in [§] 523.").

Clearly, the Complaint does not cite § 523(a) as the statutory authority under which the Plaintiff seeks relief; however, she does sufficiently set forth factual allegations under which the Defendant may discern her true intention and request for relief; i.e., that the court determine the provision in the Marital Dissolution Agreement requiring the Defendant to continue payments to the Chapter 13 Trustee in the parties' former joint Chapter 13 bankruptcy case is nondischargeable because it is in the nature of alimony, maintenance, or support pursuant to § 523(a)(5). In particular, paragraph 10 of the Complaint states:

> The Marital Settlement Agreement, in that it *inter alia* "settles and determines all claims for alimony," provided the Plaintiff with a periodic alimony benefit necessary for her support which cannot be discharged in bankruptcy.

This language is sufficient to put the Defendant on notice that § 523(a)(5) is the actual statutory authority for the Plaintiff's cause of action, despite her admitted mistake in citing § 727(a) as the basis for her Complaint.

The determination of a debt's dischargeability is also governed by Federal Rule of Bankruptcy Procedure 4007, which provides that "[a] complaint other than under § 523(c) may be filed at any time." FED. R. BANKR. P. 4007. Accordingly, with the exception of those debts "specified in paragraph (2), (4), (6), or (15) of subsection (a) of [§ 523]," the nineteen types of debts listed in § 523 are nondischargeable, per se. 11 U.S.C.A. § 523(c). Nevertheless, the bankruptcy court must make a determination of nondischargeability pursuant to an adversary proceeding. *See* FED. R. BANKR. P. 4007; FED. R. BANKR. P. 7001(6)

("[A] proceeding to determine the dischargeability of a debt" is an adversary proceeding.). Each adversary proceeding must contain a statement that the proceeding is "core or non-core." FED. R. BANKR. P. 7008(a). Finally, the party seeking a determination of nondischargeability under any subsection of § 523(a) has the burden of proof by a preponderance of the evidence. *Grogan v. Garner,* 111 S. Ct. 654, 661 (1991).

The party seeking nondischargeability of a debt should specify the subsection under which the debt falls and must provide facts supporting the necessary elements under each subsection. *See, e.g., Laughter v. Speight,* 167 B.R. 891, 893 (W.D. Ark. 1993); *Boan v. Damrill (In re Damrill)*, 232 B.R. 767, 776 (Bankr. W.D. Mo. 1999). However, the failure to specify under which subsection a party is requesting a determination of nondischargeability is not, in and of itself, fatal to a complaint as long as it offers enough factual information for the court and the defendants to make an educated assessment as to the proper subsection. *See, e.g., Cmty. Mem'l Hosp. v. Gordon (In re Gordon)*, 231 B.R. 459, 461 n.3 (Bankr. D. Conn. 1999).

Taking the pleadings in a light most favorable to the Plaintiff, the court believes that the Complaint sufficiently sets forth enough information for the Defendant to make an assessment that the Plaintiff is seeking a determination of nondischargeability under § 523(a)(5).

IV

A debtor may not discharge a debt to a former spouse for alimony, maintenance, or support as long as "such liability is actually in the nature of alimony, maintenance, or support[.]" 11 U.S.C.A. § 523(a)(5)(B). Whether a debt constitutes alimony, maintenance, or support under § 523(a)(5) is a matter of federal law, but because these issues fall "within the exclusive domain of the state courts[,]" the bankruptcy court should also rely on state law in making its determination. *Long v. Calhoun (In re Calhoun)*, 715 F.2d 1103, 1107-08 (6th Cir. 1983). In the Sixth Circuit, courts must apply the following three-part test to decide whether alimony, maintenance, or support is actually in the nature thereof: (1) whether the award was intended to be support; (2) whether the award was effectively support in light of the recipient non-debtor's present needs; and (3) whether the award was "manifestly unreasonable under traditional concepts of support." *Calhoun*, 715 F.2d at 1109-1110.

The Marital Dissolution Agreement entered into between the parties expressly provides for the Defendant to continue making payments to the Chapter 13 Trustee in the parties' joint bankruptcy case. Reading the Complaint in the light most favorable to the Plaintiff, it is averred that the Defendant agreed to make these payments as a form of support for the Plaintiff. As such, the Defendant's Motion to Dismiss shall be denied.[1]

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[1] The Defendant did not raise any substantive issues regarding whether the Marital Dissolution Agreement could validly coerce the Defendant to remain in a Chapter 13 bankruptcy case, *see, e.g., In re Faulhalser*, 243 B.R. 281, 287-88 (Bankr. E.D. Tex. 1999) (stating that Congress intended for Chapter 13 to be voluntary), or whether the *Calhoun* test has been satisfied, *see* 715 F.2d at 1109-10. As such, the court has not considered those issues.

An order consistent with this Memorandum will be entered.

FILED: June 4, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

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Defendant

O R D E R

For the reasons stated in the Memorandum on Motion to Dismiss filed this date, the court directs that the Motion to Dismiss filed by the Defendant on April 30, 2004, is DENIED.

SO ORDERED.

ENTER: June 4, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE